



State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



Donald Gagne
d/b/a Apex Roofing and Skylight Service
737 South Street
Milford, NH 03055

Re: 246 Route 13, Brookline, NH

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING
NO. AF 03-002**

February 13, 2003

I. INTRODUCTION

This Notice of Proposed Administrative Fine and Hearing ("Notice") is issued by the Department of Environmental Services, Waste Management Division ("the Division") to Donald Gagne d/b/a Apex Roofing and Skylight Service, pursuant to RSA149-M:16 and Env-C 601.05. The Division is proposing that fines totaling \$16,000 be imposed against Donald Gagne d/b/a Apex Roofing and Skylight Service, for the violations alleged below. **This Notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Waste Management Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. Donald Gagne is an individual doing business as Apex Roofing and Skylight Service ("Apex") and having a mailing address of 737 South Street, Milford, NH 03055.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. Pursuant to RSA 149-M, DES regulates the management and disposal of solid waste. Pursuant to RSA 149-M:7, the Commissioner of DES has adopted Env-Wm 100 – 300, 2100 *et seq.* ("Solid Waste Rules") to implement this program.
2. Pursuant to RSA 149-M:16, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of RSA 149-M or rules adopted pursuant thereto. Pursuant to this section, the Commissioner has adopted Env-C 612 to establish the schedule of fines for such violations.
3. Edward Magee is the owner of land located at 246 Route 13, Brookline, NH, more particularly described in a deed recorded in the Hillsborough County Registry of Deeds at Book 5818, Page 1391, and identified on Brookline Tax Map D, as Lot 3 (the "Site").

4. On March 18 and 19, 2002, the Division received two complaints alleging that computer monitors and other solid wastes were disposed at the Site.
5. On April 15, 2002, Division personnel investigated the allegations of illegal disposal of solid waste at the Site.
6. During the April 15 inspection, Division personnel met with Edward Magee, the owner of the Site. Mr. Magee informed Division personnel that Apex, a business owned by Donald Gagne, was renting space at the Site.
7. RSA 149-M:4, XXII defines "solid waste" as "any matter consisting of putrescible material, refuse, residue from an air pollution control facility, and other discarded or abandoned material."
8. RSA 149-M:4, XXI defines "refuse", in part, as "any waste product ... which is composed wholly or partly of such materials as ... brick, plaster or other waste resulting from the demolition, alteration, or construction of buildings or structures; or accumulated waste material, cans, containers, tires, junk, or other such substances which may become a nuisance."
9. Env-Wm 102.42 defines "construction and demolition debris" in part, as "non-putrescible waste building materials and rubble which is solid waste resulting from the construction, remodeling, repair or demolition of structures or roads. The term includes but is not limited to, bricks, concrete and other masonry materials, wood, wall coverings, plaster, dry wall, plumbing, fixtures, non-asbestos insulation or roofing shingles, asphaltic pavement, glass, plastics that are not sealed in a manner that conceals other wastes and electrical wiring and components, incidental to any of the above and containing no hazardous liquid or metals. The term does not include asbestos waste, garbage, corrugated container board, electrical fixtures containing hazardous liquids such as fluorescent light ballasts or transformers, furniture, appliances, tires, drums and containers, and fuel tanks."
10. During the April 15 inspection, Division personnel observed waste, including paper, computer equipment, electronic equipment, small electric motors, and roofing shingles at the Site. Approximately 300 cubic yards of paper and roofing shingles were dumped in a fill area located behind the barn at the Site. The paper was disposed over the embankment and covered with wood chips and old roofing shingles. There was a large quantity of paper and computer equipment sitting directly next to the fill area. (See attached Site map.)
11. During the April 15 inspection, Mr. Magee informed the Division that the roofing shingles observed at the Site were brought on Site by Apex.
12. On April 18, 2002, Division personnel met with Mr. Gagne to discuss his disposal of roofing material at the Site. Mr. Gagne confirmed that he had disposed greater than 20 cubic yards of roofing material at the Site.

13. The roofing shingles, paper, small electric motors, and electronic equipment observed by the Division at the Site are solid wastes as defined by RSA 149-M:4, XXII.

14. RSA 149-M:4, IX defines a "[solid waste] facility" as "a location, system, or physical structure for the collection, separation, storage, transfer, processing, treatment or disposal of solid waste."

15. The Site constitutes a "solid waste facility" as defined by RSA 149-M:4, IX.

16. RSA 149-M:9, I states that "No person shall construct, operate or initiate closure of a public or private facility without first obtaining a permit from [DES]."

17. A review of the Division's files show that Edward Magee, the Site owner, has not applied for nor does he hold a permit to operate a solid waste facility at any New Hampshire location.

18. RSA 149-M:9, II states that "It shall be unlawful to transport solid waste to, or dispose of solid waste at, any facility other than an approved [solid waste] facility."

19. Apex transported solid waste to, and disposed of solid waste, at an unpermitted solid waste facility.

20. On May 30, 2002, the Division issued Administrative Order No. WMD 02-14 ("Order") to Donald Gagne d/b/a Apex Roofing and Skylight Service for violations of RSA 149-M and the Solid Waste Rules.

21. The Order required Mr. Gagne to remove all the roofing related solid waste at the Site within 180 days the date of the Order (by November 30, 2002).

22. On July 2, 2002, Division personnel conducted a follow-up inspection of the Site. Division personnel observed that the shingles found at the Site during the April 15 inspection remained at the Site.

23. On October 31, 2002, Division personnel conducted a second follow-up inspection of the Site. Division personnel observed that the shingles found at the Site during the April 15 inspection remained at the Site.

24. On December 4, 2002, Division personnel conducted a third follow-up inspection of the Site. Division personnel observed that the shingles found at the Site during the April 15 inspection remained at the Site.

25. As of the date of this Notice, Mr. Gagne has failed to comply with the Order issued pursuant to RSA 149-M:15.

IV. VIOLATIONS ALLEGED

1. Donald Gagne d/b/a Apex Roofing and Skylight Service has violated RSA 149-M:9, II by transporting solid waste to an unpermitted solid waste facility.
2. Donald Gagne d/b/a Apex Roofing and Skylight Service has violated RSA 149-M:9, II by disposing of solid waste at an unpermitted solid waste facility.
3. Donald Gagne d/b/a Apex Roofing and Skylight Service has violated RSA 149-M:15, I by failing to comply with the Order.

V. PROPOSED ADMINISTRATIVE FINES

1. For the violation identified in IV.1 and IV.2., above, Env-C 612.11(b) specifies a fine of \$2,000 per 20 cubic yards of debris transported or disposed. Mr. Gagne admitted to transporting and disposing of greater than 20 cubic yards of asphalt shingles at the Site. For the violation noted above, the Division is seeking a total fine of \$4,000.
2. For the violation identified in IV.3. above, Env-C 612.11(d) specifies a fine of \$2,000 per calendar month or portion thereof that compliance is not achieved after the deadline specified in the Order for each provision of the Order that is not complied with. For this violation, the Division is seeking a total fine of \$12,000 for six months (June-December) of non-compliance with the Order.

The total fine being sought is \$16,000.

VI. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Pursuant to Env-C 601.06, you are required to respond to this Notice. Please respond no later than March 13, 2003 using the enclosed colored form.

1. If Donald Gagne d/b/a Apex Roofing and Skylight Service would like to have a hearing, please sign the appearance section of the colored form and return it to the DES Legal Unit, as noted on the form. A Notice of Scheduled Hearing will be issued.
2. If Donald Gagne d/b/a Apex Roofing and Skylight Service chooses to waive the hearing and pay the proposed fine, please have an authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.
3. If Donald Gagne d/b/a Apex Roofing and Skylight Service wishes to discuss the possibility of settling the case, please have an authorized representative sign the appearance and return it to the DES Legal Unit and call the DES Legal Unit to indicate Donald Gagne d/b/a Apex Roofing and Skylight Service's interest in settling.

Donald Gagne d/b/a Apex Roofing and Skylight Service is not required to be represented by an attorney. If Donald Gagne d/b/a Apex Roofing and Skylight Service chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

VII. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that Donald Gagne d/b/a Apex Roofing and Skylight Service committed the violation(s) alleged and that the total amount of fine(s) sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that Donald Gagne d/b/a Apex Roofing and Skylight Service committed the violation(s) and that the total amount of fine(s) sought is the appropriate amount under the applicable statute and rules, then the fine(s) sought will be imposed, subject to the following:

Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Donald Gagne d/b/a Apex Roofing and Skylight Service proves, by a preponderance of the evidence**, applies in this case:

1. The violation was a one-time or non-continuing violation, **and** Donald Gagne d/b/a Apex Roofing and Skylight Service did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** Donald Gagne d/b/a Apex Roofing and Skylight Service did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, Donald Gagne d/b/a Apex Roofing and Skylight Service was making a good faith effort to comply with the requirement that was violated.
3. Donald Gagne d/b/a Apex Roofing and Skylight Service has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to Donald Gagne d/b/a Apex Roofing and Skylight Service's case which was not known to the Division at the time the fine was proposed.

IMPORTANT NOTICE

An administrative fine hearing is a formal hearing. Any hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that Donald Gagne d/b/a Apex Roofing and Skylight Service committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Donald Gagne d/b/a Apex Roofing and Skylight Service's opportunity to present testimony and evidence that Donald Gagne d/b/a Apex Roofing and Skylight Service did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Donald Gagne d/b/a Apex Roofing and Skylight Service has any evidence, such as photographs, business records or other documents, that Donald Gagne d/b/a Apex Roofing and Skylight Service believes show that Donald Gagne d/b/a Apex Roofing and Skylight Service did not commit the violation(s) or that otherwise support Donald Gagne d/b/a Apex Roofing and Skylight Service's position, Donald Gagne d/b/a Apex Roofing and Skylight Service should bring the evidence to the hearing. Donald Gagne d/b/a Apex Roofing and Skylight Service may also bring witnesses (other people) to the hearing to testify on Donald Gagne d/b/a Apex Roofing and Skylight Service's behalf.

If Donald Gagne d/b/a Apex Roofing and Skylight Service wishes to have an informal meeting to discuss the issues, Donald Gagne d/b/a Apex Roofing and Skylight Service must contact the DES Legal Unit at (603) 271-6330 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via DES's Web page (www.state.nh.us.des). If Donald Gagne d/b/a Apex Roofing and Skylight Service has any questions about this matter, please contact DES Legal Unit at (603) 271-6330.

COPY

Philip J. O'Brien, Ph.D., P.G., Director
Waste Management Division

Enclosure (NHDES Fact Sheet #CO-2000)

cc: DB/File
Gretchen Rule, DES Legal Unit
Susan Alexant, DES Hearings and Rules Attorney
Town of Brookline
Tammy Calligandes

***** RETURN THIS PAGE ONLY *****

**DONALD GAGNE d/b/a APEX ROOFING AND SKYLIGHT SERVICE
IS REQUIRED BY LAW TO RESPOND TO THIS NOTICE.**

PLEASE RESPOND NO LATER THAN MARCH 13, 2003

Please check the appropriate line and fill in the requested information below.

APPEARANCE On behalf of Donald Gagne d/b/a Apex Roofing and Skylight Service ,

____ I request to have a **formal hearing** scheduled in this matter.

____ I request to have a **prehearing conference** scheduled in this matter.

____ I would like to **meet informally** to discuss the issues in this matter.

WAIVER OF HEARING On behalf of Donald Gagne d/b/a Apex Roofing and Skylight Service

____ I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$16,000.00 paid to "Treasurer, State of New Hampshire" is enclosed.*

Pursuant to Env-C 203.05 please provide the following information:

Signature

Date

Name (please print or type): _____

Title: _____

Phone: _____

RETURN THIS PAGE ONLY TO:

**Michael Sclafani, Legal Assistant
Department of Environmental Services
Legal Unit
6 Hazen Drive, P.O. Box 95
Concord, NH 03302-0095**

**If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*